86-568

Supreme Court, U.S.
FILED
OCT 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JAMES A. POTTER,
Appellant,

VS.

BETTY L. ABSHIRE,
Appellee.

On Appeal from the Court of Appeal of California Fifth Appellate District

JURISDICTIONAL STATEMENT

MATTANIAH EYTAN
KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS
380 California Street, Suite 1600
San Francisco, California 94104
(415) 421-1100
Counsel for Appellant

October 6, 1986

108 pp

QUESTION PRESENTED

Whether California Civil Code § 5124 impermissibly conflicts with the United States Constitution by authorizing divorce courts to reopen and reverse final judgments which had, pursuant to federal law requirements, awarded the entirety of military retired pay to the military member.

JURISDICTIONAL STATEMENT

Appellant James A. Potter appeals from the final judgment of the Court of Appeal of California, Fifth Appellate District, following the California Supreme Court's denial of his Petition for Hearing.

Because of appellant's challenge of the constitutionality of a state statute, 28 U.S.C. § 2403(b) may be applicable.

TABLE OF CONTENTS

	Page
Question Presented	i
Jurisdictional Statement.....	ii
Table of Authorities.....	v
Opinions Below.....	1
Jurisdiction.....	2
Statutes and Constitutional Provisions Involved.....	3
Statement of the Case.....	4
Subsidiary Issues Encompassed in the Question Presented.....	12
The Question is Substantial.....	14
Appendix A Opinion Below (California Court of Appeal).....	A-1
Appendix B Order Denying Petitioner's Motion to Modify Interlocutory Judgment of Dissolution of Marriage re Military Retirement Benefits (Superior Court).....	B-1
Appendix C Order Denying Review (Supreme Court of California).....	C-1

Appendix D
Interlocutory Judgment of Dissolution of Marriage (Superior Court)..... D-1

Appendix E
Notice of Appeal (to the Supreme Court of California)..... E-1

Appendix F
Constitutional and Statutory Provisions..... F-1

TABLE OF AUTHORITIES CITED

	Page
Federal Cases:	
Allied Structural Steel Co. v. Spannaus 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978).....	27
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106 (1921).....	2
Federated Department Stores v. Moite 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).....	28
Hisquierdo v. Hisquierdo 439 U.S. 572, 99 S.Ct. 802 (1979).....	26
C. F. Hodges v. Snyder, 261 U.S. 600, 43 S.Ct. 435 (1923).....	21
McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728 69 L.Ed.2d 589 (1981).....	passim
McGrath v. Potash 199 F.2d 166 (D.C.Cir. 1952).....	22
Penn. v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).....	22

Railroad Retirement Board v.
Alton Railroad
295 U.S. 330,
55 S.Ct. 758 (1935)..... 27

System Fedn. No. 91, Ry. Employees'
Dep't. v. Wright,
364 U.S. 642,
81 S.Ct. 368 (1961)..... 21

Union Pacific R. Co. v.
Laramie Stock Yards Co.,
231 U.S. 190,
34 S.Ct. 101 (1913)..... 25

United States Fidelity & Guaranty Co.
v. United States ex rel. Struthers
209 U.S. 306,
28 S.Ct. 537 (1908)..... 25

United States v.
Security Industrial Bank,
459 U.S. 70,
103 S.Ct. 407 (1982)..... 24

United States v. Larionoff,
431 U.S. 881,
97 S.Ct. 2150 (1977)..... 24

State Cases:

Allison v. Allison,
690 S.W.2d 340
(Tex.App. 1985)..... 17

Aloy v. Mash,
38 Cal.3d 413,
212 Cal.Rptr. 162 (1985)..... 11

Breen v. Breen,
693 S.W.2d 495
(Tex.App. 1985)..... 17

Burton v. Burton,
99 Nev. 698,
669 P.2d 703 (1983)..... 18

Casas v. Thompson,
217 Cal.Rptr. 471,
171 Cal.App.3d 458 (1985).... 34

Castle, In re Marriage of,
180 Cal.App.3d 206,
225 Cal.Rptr. 382 (1986)..... 11

Castiglioni v. Castiglioni,
192 N.J.Super. 594
471 A.2d 809 (1984)..... 16

Cox, In re Marriage of,
178 Cal.App.3d 240,
223 Cal.Rptr. 655 (1986)..... 10, 11, 17

Downes, In re Marriage of,
177 Cal.App.3d 205,
222 Cal.Rptr. 7876 (1983).... 18

Edsall v. Superior Court,
693 P.2d 895 (Ariz. 1984).... 15

Flannagan v. Flannagan,
709 P.2d 1247
(Wash.App. 1985)..... 15

Giroux, In re Marriage of,
41 Wash.App. 315,
704 P.2d 160 (1985)..... 23

Habermehl, In re Marriage of,
481 N.E.2d 782
(Ill.App. 5 Dist. 1985)..... 16, 33

Harkins v. Harkins,
681 P.2d 722 (N.M. 1984)..... 16

Koppenhaver v. Kopperhaver,
678 P.2d 1180
(N.M.App. 1984)..... 14

Mueller v. Walker,
167 Cal.App.3d 600,
213 Cal.Rptr. 442 (1985)..... 8, 9, 18

Norris v. Saueressig,
717 P.2d 52,
54 (N.M. 1986) 14

Quintard, In re Marriage of,
691 S.W.2d 950
(Mo.App. 1985) 15, 16

Smith v. Smith,
458 A.2d 711
(Del.Fam.Ct. 1983)..... 17

United States Constitution:

Art. I, § 10..... 4, 13

Art. VI, Cl. 2..... 4, 12

14th Amendment § 1..... 4, 13

Statutes

Federal

10 U.S.C. § 1408..... passim

U.S.C. § 2403(b) ii

28 U.S.C. § 1257(2)..... 2

State

California Civil Code § 5124..... passim

Miscellaneous

Legislative Materials:
S.Rep.No. 502, 97th Cong., 2d Sess. 16 (reprinted in 1982 U.S. Code. Cong. & Ad. News 1596, 1611)..... 23

128 Cong.Rec. H4720 (Daily ed. July 28, 1982)..... 23

128 Cong.Rec. H4734 (Daily ed. July 28, 1982)..... 24

Articles:
Chavarrie, "The Dollars & Sense of Military Retirement", Defense (85) (May 1985) p. 16..... 33

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

-

No. _____

JAMES A. POTTER, APPELLANT

v.

BETTY L. ABSHIRE, APPELLEE

-

On Appeal from the
Court of Appeal of California
Fifth Appellate District

-

OPINIONS BELOW

The opinion of the Court of Appeal (App. A, infra), appears at 179 Cal.App.3d 73, 224 Cal.Rptr. 312. The order of the Superior Court, Kings County (App. B, infra), is unreported. The California Supreme Court rendered no opinion when it denied appellant's Petition for Hearing. (See App. C, infra.)

JURISDICTION

The California Court of Appeal entered its judgment on March 25, 1986. The Supreme Court of California denied appellant's Petition for Hearing on July 9, 1986. A notice of appeal to this Court was duly filed in the California Court of Appeal and the California Supreme Court on October 3, 1986.

This appeal is being docketed within 90 days of the California Supreme Court's denial of appellant's petition for hearing.

Appellant argued below that § 5124 of the California Civil Code, as applied to appellant's Navy retainer pay, was repugnant to federal statutes and invalid under the United States Constitution. The California courts upheld the validity of the state statute. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2). Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282

(1921); McCarty v. McCarty, 453 U.S. 210 (1981).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of California Civil Code § 5124, which entered into force on January 1, 1984 and which expired under its own terms on January 1, 1986. Paragraph (a) of § 5124 provides as follows:

> Community property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this State as it existed before June 26, 1981, and as it has existed since February 1, 1983.

The balance of § 5124 appears in Appendix F.

This case also involves, in primary part, the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA), 10 U.S.C.

§ 1408 which in subparagraph (c)(1) provides as follows:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The entirety of § 1408 is set forth in Appendix F, 2, along with Constitutional provisions which appellant invokes in his behalf: the Contract Clause, Art. I, § 10; the Supremacy Clause, Art. VI, Cl. 2; and the Due Process Clause of the 14th Amendment.

STATEMENT OF THE CASE

Appellant ("husband") is a Commander with the United States Navy, having retired on February 1, 1978, after 25 years active military service. Husband served three tours in Vietnam and flew over 400 combat missions. (Rptr's Tr. 12:11) The parties

were divorced by an Interlocutory Decree of Dissolution entered by the Superior Court, Kings County, on November 16, 1981 after 20 years of marriage, 17 years of which were completed while husband was in active military service. Based upon McCarty v. McCarty 453 U.S. 210 (1981), the parties stipulated in the Decree that "[t]he U.S. Navy retirement benefits presently received by [husband] is confirmed to him as his separate property". (App. D-6.) The remaining community property was divided, and the appellee ("wife") was awarded spousal support. (App. D-6, 7-12.) Each party also declared he or she waives "his or her rights to appeal or to ask for new trial." (App. D-14.) A final Judgment of Dissolution was entered on November 24, 1981.

On September 8, 1982, the Congress enacted the FUSFSPA to enter into force on

February 1, 1983. In 1983, the California Legislature enacted Civil Code § 5124 to enter into force on January 1, 1984 and to expire on January 1, 1986. On December 5, 1983, wife petitioned to reopen the Interlocutory Judgment claiming an entitlement under § 5124 to a 34% allocable share of husband's Navy retainer pay. By that time, wife had remarried, but husband was unemployed and awaiting unemployment benefits (Rptr's Tr. 23: 25).

On May 31, 1984, the trial court filed its order denying wife's motion for modification concluding that giving effect to § 5124 in the manner requested by wife would be unconstitutional. In so holding the court stated as follows:

> The Court . . . denies the Motion to Modify the Interlocutory Judgment. To apply Civil Code Section 5124 as it is written would be unconstitutional in that to only modify an agreement with respect to the

> retirement benefit would be an ex post facto impairment of contract and on the further basis of the doctrine of res judicata.

(App. B.)

In the Court of Appeal, husband maintained that federal statutes, taken together with the Supremacy Clause of the federal Constitution, preempted California from applying § 5124 to reopen his final judgment so as to divide his retainer pay. In any event, husband argued, to give effect to § 5124 to reopen final judgments which had been based upon federal law as articulated in McCarty, would constitute a deprivation of property without due process. Also, since the interlocutory judgment had constituted a stipulation between the parties, based upon the presumed applicability of federal law, for the courts of California to vitiate that stipulation under § 5124 would violate the Contract Clause of the federal

Constitution.

The Court of Appeal reversed the Superior Court, finding no conflict between § 5124 and the FUSFSPA. Although the Court accepted the view that the FUSFSPA did not apply to final judgments rendered prior to February 1, 1983, it nevertheless determined that the Congress had intended the retrospective application of FUSFSPA to be complete. Based upon this assumption, the Court determined that it was appropriate for California in § 5124 to assure retroactive application to final judgments by taking the further and last step that the Congress had not taken. This step was accomplished through § 5124.

Quoting extensively from Mueller v. Walker (1985) 167 Cal.App.3d 600, 213 Cal.Rptr. 442, the Court of Appeal determined that husband's Due Process and Contract Clause contentions lacked merit: the state's

"paramount interest" in assuring an equitable distribution of property between spouses justified the exercise of the state's police power in the circumstances; the former, final judgment would be reopened pursuant to § 5124 with instructions to the Superior Court to award wife the very same property which the previous judgment had determined under federal law to belong to the husband alone. 1/

1/ In Mueller, supra, the court had held that § 5124 does not violate due process stating:

> . . . [T]he state's 'paramount interest' in the equitable distribution of marital property upon dissolution of the marriage points to section 5124 as a proper exercise of the police power . . . We hold that section 5124 authorizes the modification of the final judgment here to include a division of military retirement benefits. 167 Cal.App.3d at 609.

Husband filed a petition for hearing with the Supreme Court of California, reiterating his previous arguments. He also pointed out that Division 3, Fourth District of the Court of Appeal, had on April 4, 1986 in In re Marriage of Cox, 178 Cal.App.3d 240, 223 Cal.Rptr. 655, come to a different conclusion on identical facts. There, the superior court had in 1982, during the "window period" awarded the husband the entirety of military retired pay, on the strength of federal law. However, after FUSFSPA and § 5124 had been enacted, the wife sought to reopen the final judgment in the expectation of securing a different result which would award her part of the retired pay. The Cox court determined that because FUSFSPA did not expressly authorize that degree of retrospective application adequate to authorize the reopening of final decisions

which had awarded retired pay to the military retiree, § 5124 could not separately accomplish this objective. To allow § 5124 to operate in the manner contemplated by California would conflict with federal law in effect at the time the original judgments issued. Accordingly, § 5124 "must yield to the supremacy clause of the United States Constitution". Cox, supra, 178 Cal.App.3d at 246, 223 Cal.Rptr. at 658.

Despite the conflict between the decision below (Fifth Appellate District) and the decision in Cox (Fourth Appellate District), the Supreme Court denied husband's Petition for Hearing. 2/

2/ The only California Supreme Court consideration of post-McCarty, pre-FUSFSPA cases is Aloy v. Mash (1985) 38 Cal.3d 413, 212 Cal.Rptr. 162. This case was read by the Cox court to support the conclusion that FUFSPA does not encompass final judgments. However, In re Marriage of Castle (1986) 180 Cal.App.3d 206, 225 Cal.Rptr. 382, a still later case cited Aloy to support an opposite conclusion.

SUBSIDIARY ISSUES ENCOMPASSED IN THE QUESTION PRESENTED

The Question Presented breaks down into two subsidiary issues, the second one of which has three subparts:

1. Did the Congress intend that FUSFSPA serve as legal authority for state divorce courts to reopen final judgments rendered during the window period (June 26, 1981 to January 31, 1983) in favor of military retirees?

2. If the Congress did not so intend, is state law, as enacted or as applied,

   a. repugnant to federal law and, hence, invalid under the Supremacy Clause;

b. invalid under the Due Process Clause of the 14th Amendment; or

c. invalid under the Contract Impairment Clause of Article I of the Constitution?

Appellant does not raise in this appeal whether if FUSFSPA were construed as authority for invalidating prior final judgments FUSFSPA would itself be invalidated, as thus applied, by the Due Process Clause in the Fifth Amendment. 3/

3/ Although a due process analysis under the 14th Amendment would be similar in most respects to an analysis under the Fifth Amendment, appellant nevertheless does not raise this precise issue because he did not put it forward below. Also, before the lower courts appellant argued that § 5124 was incompatible with Due Process and Contract Impairment Clauses in the California constitution; he also contended that § 5124 should not be applied to him, because in the circumstances, such a result would be inequitable. These contentions are not renewed in this appeal and constitute no part of the Question Presented.

THE QUESTION IS SUBSTANTIAL

The question warrants plenary consideration for three reasons:

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS BY OTHER STATE COURTS

The decision below conflicts with decisions by other state courts as to whether the Congress intended FUSFSPA to allow state divorce courts to reopen final judgments which had awarded military retired pay to the military retiree as his personal and exclusive entitlement. The cases break down into three categories:

(1) Cases which hold that the Congress did so intend:

New Mexico -- Norris v. Saueressig, 717 P.2d 52, 54 (N.M. 1986); Koppenhaver v. Koppenhaver,

---

678 P.2d 1180 (N.M.App. 1984) (technical recourse to state counterpart to Fed.R.Civ.P. 60(b) to reopen a final judgment).

Arizona -- Edsall v. Superior Court, 693 P.2d 895 (Ariz. 1984) (recourse to state counterpart to Fed.R.Civ.P. 60(b)).

Washington -- Flannagan v. Flannagan, 709 P.2d 1247 (Wash.App. 1985) (recourse to state counter-part to Fed.R.Civ.P. 60(b)). 4/

4/ The presence of a state counterpart to Rule 60(b) has not always been adequate to allow reopening, even if the Court otherwise deems FUSFSPA sufficiently retroactive to justify reopening final judgment. See, e.g.,

Missouri -- In re Marriage of Quintard, 691 S.W.2d 950 (Mo. App. 1985) (state rule held not sufficiently broad to allow reopening).

(f.n. con't on next page)

Missouri -- In re Marriage of Quintard, 691 S.W.2d 950 (Mo.App. 1985) (Although Congress did so intend, claim preclusion under state law bars recovery).

New Jersey-- Castiglioni v. Castiglioni, 192 N.J.Super. 594, 471 A.2d 809 (1984) (recourse to state counterpart to Fed.R.Civ.P. 60(b)).

(f.n. con't from previous page)

Illinois -- In re Marriage of Habermehl, 481 N.E.2d 782 (Ill.App. 5 Dist. 1985) (State counterpart Rule 60(b) not applied so as to reopen because of an insufficient showing of inequity).

New Mexico -- Harkins v. Harkins, 681 P.2d 722 (N.M. 1984) (State counterpart Rule 60(b) not invoked because of perceived inequity in vacating divorce stipulation).

Delaware -- Smith v. Smith, 458 A.2d 711 (Del.Fam.Ct. 1983) (recourse to state counterpart to Fed.R.Civ.P. 60(b)).

(2) Cases which determined that the Congress did not intend FUFSPA to overturn final decisions which had awarded retired pay to the military retiree:

Texas -- Allison v. Allison, 690 S.W.2d 340 (Tex.App. 1985); Breen v. Breen, 693 S.W.2d 495 (Tex.App. 1985).

California -- In re Marriage of Cox, 178 Cal.App.3d 240, 223 Cal.Rptr. 655 (1986).

In the foregoing cases, the courts were mindful that a determination that the Congress had intended to overturn final decisions would require consideration of

difficult constitutional issues.

(3) Cases in which the court determined that the Congress did not intend FUFSPA to allow the reopening of prior final decisions, but allowed state legislation, such as § 5124, to fill the gap:

Nevada -- Burton v. Burton, 99 Nev. 698, 669 P.2d 703 (1983) (reopening a final judgment pursuant to a statute similar to § 5124).

California -- Mueller v. Walker, 167 Cal.App.3d 600, 213 Cal.Rptr. 442 (1985) (reopening of final judgment pursuant to § 5124); cf. In re Marriage of Downes, 177 Cal.App.3d 205, 222 Cal.Rptr. 776 (1983) (FUSFSPA not adequate to serve as basis for reopening,

but case remanded for consideration of § 5124).

A continuing failure to resolve conflicts among the states as to the applicability of FUSFSPA to final judgments rendered during the period between McCarty and FUSFSPA creates unsettling consequences. Military retirees with window period judgments in their favor are encouraged to leave states that reopen such judgments and establish domicile in states that give preclusive effect to such final dissolution decrees. 5/

During the window period a uniform, national rule applied as to the divisibility

---

5/ The FUSFSPA provides in § (4) that to take advantage of the provisions of the Act a petition must be brought by an aggrieved former spouse in the state of domicile of the retired member. If the domicile changes after the final window period judgment has been awarded, the holder of the favorable judgment may be able to fend off the new petition.

of retired pay. Now, depending upon the vagaries of state legislation and how states interpret their Rule 60(b) counterparts, no military retiree with a window-period judgment in his favor is secure that he will be able to retain the monthly checks that he receives for his retirement. If the final judgment in his favor is reopened and reversed, he will have to pay not only an allocable share of his future payments, but back payments as well.

Whether the Congress intended FUSFSPA to override final judgments rendered in favor of the military retiree during the window period requires a determination from this Court. California's conclusion that the Congress did not so intend, but that the California Legislature could constitutionally make up for that lapse by means of extraordinary state legislation indicates the disarray

among the states. For, if state legislation alone allows reopening of final judgments, the state legislation must by definition be in conflict with the federal law which, although preemptive, had not permitted it.

II.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

(1) The decision below is contrary to principles of claim preclusion established by this Court.

A subsequent change in legislation does not prevent the application of claim preclusion to a final judgment. System Fedn. No. 91, Ry. Employees' Dep't. v, Wright, 364 U.S. 642, 646-47 (1961) (Subsequent legislation concerning railroad union contracts requiring a union shop did not justify the modification of a pre-existing consent decree.); C. F. Hodges v. Snyder, 261 U.S. 600, 603 (1923) ("[T]he private rights of parties which have

been vested by the judgment of a court cannot be taken away by subsequent legislation"); Penn. v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 437 (1855) ("[T]he Act of Congress cannot have the effect and operation to annul the judgment of the court . . . especially as it respects adjudication upon the private rights of parties"). See also, McGrath v. Potash, 199 F.2d 166, 167 (D.C. Cir. 1952).

Except on federal preemptive grounds, this Court has never held that a judgment may be reopened and reversed by after-enacted legislation. The final judgment of a court constitutes an obligation of the highest nature known to the law. To hold otherwise is to undermine the constitutionally-shielded concept of an accrued or vested right in an adjudicated obligation. This Court would wish to safeguard that after-passed enact-

ments may neither destroy nor alter that right.

(2) The decision below conflicts with decisions of this Court concerning federal pre-emption.

The FUSFSPA contains no clear statement that the Congress intended its terms to justify the reopening of final, window-period judgments. 6/

6/ Courts holding that the Act was intended to apply to final window-period judgments rely primarily upon this legislative committee statement: "This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision." See In re Marriage of Giroux, 41 Wash.App. 315, 318-19, 704 P.2d 160 (1985) (quoting S.Rep. No. 502, 97th Cong., 2d Sess. 16, reprinted in 1982 U.S. Code Cong. & Ad.News 1596, 1611). However, other legislative history points in a different direction: see, e.g., statement by Rep. Schroeder, one of the sponsors of the FUSFSPA, that although "[s]tate law may allow reopening for changed circumstances . . . there is nothing in the bill to require it". 128 Cong.Rec. H4720 (Daily ed. July 28, 1982). Also, Congress rejected a proposed amendment that provided:
(f.n. con't on next page)

This Court has repeatedly applied the rule of construction that acts of Congress will not be given retrospective effect unless the Congress by the clearest pronouncement had so expressed its will. United States v. Larionoff, 431 U.S. 881, 879, (1977) (although the Congress may have changed the rules prospectively, Congressional action that deprives a service member of pay for services already performed "would appear in a different constitutional light. [Citations.] In view of these problems, we would not lightly conclude, in the absence of a clear expression of congressional intent [that the new legislation is retroactive]."); United States v. Security Industrial Bank,

---

(f.n. con't from previous page)
"Nothing in this title shall overrule or require the modification of any . . . state court decision in any state which treats marital property as community property." 128 Cong.Rec. H4734 (Daily ed. July 28, 1982) (amendment offered by Rep. Hance).

459 U.S. 70, 103 S.Ct. 407 (1982) (provision in bankruptcy law depriving creditors of preferred lien rights would not be given retrospective effect, because to do so would unnecessarily invoke a constitutional question.); Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) (retroactive operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature"); United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co., 209 U.S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.")

If FUSFSPA is not specifically retroactive to window-period judgments, any state effort, including California's legislative effort in § 5124, to reopen final judgments which had been based upon federal law then in force (and still in force during that window period and as it concerns final judgments) conflicts impermissibly with such federal law. Cases decided with reference to the Supremacy Clause, e.g., McCarty v. McCarty, 453 U.S. 210, (1981); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), require just such an analysis.

(3) The decision below conflicts with decisions of this court that relate to substantive due process and contract clause violations.

This Court has held that a statute violates due process where it arbitrarily imposes additional pension funding liabilities on employers for transactions

long ago completed and fully compensated. Railroad Retirement Board v. Alton Railroad, 295 U.S. 330 (1935). More recently, in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), a Minnesota statute which reduced the vesting period for qualification by an employee under a pension plan from 15 years to 10 years of service violated the Contract Clause. Such a statute "worked a severe, permanent, and immediate change" in the contractual relationship. It operated unfairly against those who voluntarily had established the pension plan. 438 U.S. at 250.

A right to benefits earned and awarded in a judgment is "vested"; the decision below, which eliminates such vested rights is therefore inconsistent with settled determinations of this Court.

III.

THE QUESTION IS IMPORTANT

At least two reasons suggest that the question is important:

1. The continuing efforts of state courts to allow reopening of final decisions on so-called equitable grounds is an unwelcome throwback to a time when res judicata was not accepted in its modern formulation. Federated Department Stores v. Moite, 452 U.S. 394, 401 (1981), is the modern articulation of the doctrine of issue preclusion:

> The doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . .

Cases overturning final judgments rendered during the window period which had awarded military retired pay to the military

retiree are pulling back from established principles of finality. In the invocation of state counterparts to Fed.R.Civ.P. 60(b), state courts which have reopened window-period final judgments, are impermissibly undermining federal law. They are elevating state notions of what an equitable result should be over principles of finality. And they are doing so in circumstances in which a federal res judicata rule must apply, because the disposition of federal benefits under federal law is involved. Rule 60(b) was never intended to provide such an avenue for the relitigation and reversal of final decisions.

California rejected the Rule 60(b) approach, no doubt realizing that rules fashioned after it were not designed to perform such functions. However, its § 5124 is more pernicious: if today's legislative

majority can decree that window-period final judgments may be reopened and decisions rendered reversed (so that former winners now become losers), law then gives way wholly to politics. An aggrieved group of military retirees might hope, perhaps a decade or so from now, to bring about still newer legislation which would allow military retirees to reopen the "final" judgments which had been rendered under authority of § 5124. If this appeal is denied, this Court will have granted its imprimatur upon the propriety of state legislation such as § 5124. Other states may be expected to follow the lead of California and Nevada in this area. They and California would no doubt also be encouraged to fashion new variations of § 5124 so that whenever the states find an opening or ambiguity in federal law that suggests that state law may

serve to reopen final judgments based upon federal law applications that have fallen into disfavor, the result as between the former litigants may be altered by new state legislation.

Claim preclusion furthers social stability by providing tribunals in which the rights of litigants may be adjudged conclusively. It promotes efficiency in the overcrowded judicial system by prevention of vexatious litigation. Against these benefits, the lower court here, and elsewhere in cases that allow reopening of window period final judgments, contend that overriding public policy concerns must govern. they argue that it would be unconscionable to have the aggrieved ex-spouses who were not successful in the window-period litigations be the group without recovery of military retired pay.

That contention, if it stands, would serve as a justification in every case where the law subsequently changes. It could always be argued that those final cases should be reopened to provide for a different result, because either the courts or the legislature has changed the rules prospectively and, in the scheme of things, earlier, unsuccessful litigants should not be discriminated against by failure to provide them with benefits which had been awarded to their litigational adversaries. 7/

7/ Congress has in any event eschewed a prospective rule of uniformity by allowing the states to fashion their own rules with respect to the division of military retired pay. Even retrospectively, however, there is no uniformity of result among the states concerning reopening window-period final judgments. An ex-spouse in Texas is not able to overturn a window-period final judgment; nor will a California ex-spouse who files a petition to reopen in 1986. There are, in addition, those states which never did consider military retired pay to be an asset divisible upon divorce. And, there are those states which will not apply their Rule 60(b)
(f.n. con't. on next page.)

2. The pool of potentially affected military retirees is large. As of May 1985 the number of military retirees drawing benefits was 1.4 million. 8/ As of September 30, 1984, the monthly average payment for military retirement was $990, which, when multiplied by 1.4 million retirees comes to over $1.386 billion per month or over $16.6 billion per year. It is apparent therefore that the pool of military retirees is large from which divorces in the window period may have taken place; and the sums involved are also cumulatively potentially very large.

Military retirees will properly see that if the states run roughshod over final

---

(f.n. con't. from previous page)
counterparts to reopen final judgment. See, In re Marriage of Habermehl, 481 N.E.2d 782 (Ill.App. 1985).

8/ Tables accompanying article by Chavarrie, Lt. Gen. Edgar A., USAF, (Deputy Assistant Secretary of Defense), "The Dollars & Sense of Military Retirement", Defense (85), 14, 16 (official annual publication of the Dept. of Defense).

judgments which gave effect to federal law as it was in effect during the window period, the states will not likely give much weight to those few provisions in FUSFSPA that put limitations on state division of military retired pay. This process of attack by state courts on those limitations is already under way. See Casas v. Thompson, 171 Cal.App.3d 458, 217 Cal.Rptr. 471 (1985), petn. for review granted Nov. 27, 1985 (ex-spouse was entitled to a community property share of the gross amount of retired pay rather the percentage of the disposable retired pay, as required by § 1408; FUSFSPA is concerned with establishing a garnishment scheme for the ex-spouse and not with substantive limitations.) Military retirees should not have to petition the Congress to reaffirm the effectiveness of existing federal legislation, simply because the states, in pursuit of exclusively state

interests, seek to erode federal limitations in this area.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

DATED: October 6, 1986

Respectfully submitted,

Mattaniah Eytan
KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS

Counsel for Appellant

MXEI2910

APPENDIX A

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of BETTY L. and JAMES A. POTTER.	5 Civ. No. F004298
BETTY L. ABSHIRE, Appellant, v. JAMES A. POTTER, Respondent.	(Super. Ct. No. 33277) O P I N I O N

BEST, Associate Justice.

Respondent (husband) commenced service with the United States Navy in July 1953 and married appellant (wife) on April 7, 1961. Husband retired on February 1, 1978, with 25 years total military service, 17 years of which were completed while the parties were married. The parties separated on April 28, 1981, and wife filed a petition for dissolution of the marriage on April 29, 1981.

The United States Supreme Court decision in McCarty v. McCarty (1981) 453 U.S. 210 was filed on June 26, 1981.

A stipulated interlocutory judgment was entered on November 16, 1981, providing, among other things: "The U. S. Navy Retirement benefits presently received by [husband] is confirmed to him as his separate property." Also contained in the interlocutory judgment was a waiver by each party of his and her rights to appeal or to ask for a new

trial in the matter. A final judgment of dissolution of the marriage was entered on November 24, 1981.

Congress enacted the Uniform Services Former Spouses' Protection Act on September 8, 1982, to take effect on February 1, 1983. (Pub.L. No. 97-252, tit. X.)

The California Legislature enacted Civil Code[1/] section 5124 in 1983 (Stats. 1983, ch. 775, § 1, p. 4255), to be effective January 1, 1984, and repealed on January 1, 1986.

On December 5, 1983, wife filed an order to show cause for modification seeking a community property determination and division of the military retirement benefits pursuant to section 5124. At a hearing held on March 29, 1984, the parties stipulated that the community property interest sought by wife

---

1/ All statutory references are to the Civil Code unless otherwise noted.

amounted to 34 percent of the military retirement net income of $1,867 per month. On May 31, 1984, the trial court rendered its decision denying wife's motion and declaring section 5124 unconstitutional in that it was "an ex post facto impairment of contract and on the further basis of the doctrine of res judicata."

DISCUSSION

Did the trial court err in ruling section 5124 unconstitutional?

A. Procedural history.

Prior to the United States Supreme Court decision of McCarty v. McCarty, supra, 453 U.S. 210, California community property law had established that federal military retirement pay was divisible community property to the extent it was earned during the marriage. (Henn v. Henn (1980) 26 Cal.3d

323, 328.) On June 26, 1981, the court in McCarty held that federal law prohibits division of military pensions and preempts state community property law. (McCarty v. McCarty, supra, at pp. 223-236.)

On April 29, 1981, wife filed a petition for dissolution of marriage, listing the U.S. Navy retirement as a community asset. Husband filed a response on May 13, 1981 (a month prior to the McCarty decision), listing the U. S. Navy retirement benefits as community property for postmarriage service time and as a separate property for premarriage service time. Husband filed an amended response on September 24, 1981 (post-McCarty), listing the U. S. Navy retirement benefits as entirely his separate property.

On October 29, 1981, husband and wife stipulated in open court that the military retirement benefits were confirmed to husband as his separate property. A final judgment of dissolution of marriage was entered on November 24, 1981.

When the judgment of dissolution of marriage became final, the McCarty decision expressed the controlling law as to military retirement pay. The United States Congress, however, quickly responded to the McCarty decision by enacting the Federal Uniform Services Former Spouses' Protection Act (FUSFSPA) on September 8, 1982. (10 U.S.C. § 1408.) FUSFSPA became effective February 1, 1983, and provides: "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981 either as property solely of the

member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

FUSFSPA has been held to overrule McCarty. (Brunson v. Brunson (1985) 168 Cal.App.3d 786, 787.) "The act's legislative history clearly indicates Congress' intent to abrogate all applications of the McCarty decision [citation]." (In re Marriage of Buikema (1983) 139 Cal.App.3d 689, 691.)

> "Although effective February 1, 1983, and containing certain provisions which were not operative until that date, the use of the date McCarty was decided as a reference in 10 United States Code section 1408(c)(1) . . . evidences a legislative intent that the law relative to community property treatment of military retirement pensions be as though McCarty did not exist, i.e., that such pensions would be subject to division as community property both before and after June 25, 1981." (In re Marriage of Frederick (1983) 141 Cal.App.3d 876, 879, fns. omitted.)

In Aloy v. Mash (1985) 38 Cal.3d 413, 421, the California Supreme Court stated:

> "[N]o case within our memory has received less retroactive application than McCarty. Starting with the last paragraph of the McCarty opinion itself, the judicial and legislative branches, state and federal, cooperated in a massive and largely successful drive to make McCarty disappear--prospectively, presently and retroactively."

Even though the intention FUSFSPA be applied retroactively in order to abrogate all application of the McCarty decision is clear, FUSFSPA has been held applicable only to those cases not yet final as of its effective date of February 1, 1983. (See In re Marriage of Hopkins (1983) 142 Cal.App.3d 350, 356-360; In re Marriage of Fairfull (1984) 161 Cal.App.3d 532, 535.) In the instant case, the judgment dissolving the parties' marriage became final before the effective date of FUSFSPA. Thus, FUSFSPA, standing alone, does not have retroactive application to allow reopening of the final judgment.

In general, the trial court loses jurisdiction to modify or alter the division of property after the judgment has become final. (Bodle v. Bodle (1978) 76 Cal.App.3d 758.) There is an exception to this general rule, however, in cases where the court expressly reserved jurisdiction to modify a property award. (In re Marriage of Brown (1976) 15 Cal.3d 838, 851; see also § 4800, subd. (a).) Here, there was no reservation of jurisdiction.

However, in the similar case of Mueller v. Walker (1985) 167 Cal.App.3d 600, 606-607, the court stated:

> "Due to the application of res judicata principles, the McCarty decision continued to state the controlling law as to those judgment decrees which became final during the 18-month hiatus created by the enactment of FUSFSPA.
>
> "To bridge the hiatus, the California Legislature enacted Civil Code section 5124 (eff. Jan. 1, 1984) permitting modification of a community property settlement, judgment or decree which

became final on or after June 25, 1981, and before February 1, 1983--the 18-month hiatus period--to include a division of military retirement benefits. Modification is authorized regardless whether the settlement, judgment or decree reserved jurisdiction over the pension or treated the pension as other than community property. Thus, by positive act the Legislature has superseded and modified the preclusive effect of the doctrine of res judicata or collateral estoppel as applied to military retirement benefits in decrees or judgments or settlements which became final in the specified time frame. Civil Code section 5124 in most clear and explicit language authorizes the remedy sought here by wife." (Fns. omitted.)

B. Does section 5124 interfere with vested property rights in violation of the due process provisions of the state and federal Constitutions?

Husband argues that section 5124[2/]

2/ Section 5124 provided at all pertinent times:

"(a) Community property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981, and as it has existed since February 1,

violates due process, since it authorizes a taking of property without due process when applied to judgments which became final before February 1, 1983, and which did not reserve jurisdiction over the military pension. Our Supreme Court has long held that the retroactive application of a statute may

---

1983.

"(b) Modification of community property settlements, judgments, or decrees under this section may be granted whether or not the property settlement, judgment, or decree expressly reserved the pension issue for further determination, omitted any reference to a military pension, or assumed in any manner, implicitly or otherwise, that a pension divisible as community property before June 25, 1981, and on or after February 1, 1983, was not, as of the date the property settlement, judgment, or decree became final, divisible community property.

"(c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986.

"(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed unless a later enacted statute which is chaptered before that date deletes or extends that date."

be unconstitutional if it is an ex post facto law, or if it deprives a person of a vested right without due process of law, or if it impairs the obligation of a contract. (In re Marriage of Buol (1985) 39 Cal.3d 751, 756.)

In In re Marriage of Buol, supra, the California Supreme Court recently affirmed the rules governing retroactive application of statutes and the factors to be considered as stated in In re Marriage of Bouquet (1976) 16 Cal.3d 583 as follows:

> "Vested rights are not immutable; the state, exercising its police power may impair such rights when considered reasonably necessary to protect the health, safety, morals and general welfare of th people. (Bouquet, supra, 16 Cal.3d at p. 592.) In determining whether a given provision contravenes the due process clause we look to 'the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law

would disrupt those actions.' (Ibid.)

"Where 'retroactive application is necessary to subserve a sufficiently important state interest' (Bouquet, supra, 16 Cal.3d at p. 593), the inquiry need proceed no further. [Citation.] In Bouquet, where we validated retroactive application of an amendment to Civil Code section 5118 making the postseparation earnings of both spouses, not just those of the wife, separate property, we emphasized that '[t]he state's interest in the equitable dissolution of the marital relationship supports this use of the police power to abrogate rights in marital property that derived from the patently unfair former law.' (Bouquet, supra, 16 Cal.3d at p. 594.) As noted in Bouquet, we reached the same conclusion in Addison [v. Addison (1965)] 62 Cal.2d 558, wherein we upheld the constitutionality of retroactive application of quasi-community property legislation despite its interference with the husband's vested property rights.

"In both Bouquet and Addison we identified an important state interest in the 'equitable dissolution of the marital relationship' and stressed that retroactive application was necessary to remedy 'the rank injustice of the former law.' (Bouquet, supra, 16 Cal.3d at p. 594; Addison, supra, 62 Cal.2d at p. 567.)

"Thus, these cases support the proposition that the state's paramount interest in the equitable dissolution of

the marital partnership justifies legislative action abrogating rights in marital property where those rights derive from manifestly unfair laws." (In re Marriage of Buol, supra, 39 Cal.3d 751, 760-761.)

In Mueller v. Walker, supra, the court relied on In re Marriage of Bouquet, supra, to hold that section 5124 does not violate the due process clause, stating as follows:

"We conclude the language of this section as well as its legislative history leave no doubt that any property divisions made in reliance upon the McCarty decision which became final before the effective date of FUSFSPA are susceptible to redivision as community property so long as action is taken before the scheduled repeal date. This law is a clear expression of legislative intent that recovery of a community property interest in a military pension benefit should not be barred simply because the case by chance falls into the 18-month gap between the effective dates of FUSFSPA and the McCarty decision. Section 5124 contemplates persons such as wife here should be entitled to the same protections as those persons whose judgments of dissolution did not become final during that same period.

"Here, no subtle balance is required for the legislative intent is patent, clear, explicit, and the state's 'para-

> mount interest' in the equitable distribution of marital property upon dissolution of the marriage points to section 5124 as proper exercise of the police power. Finally, such a curative type of legislation supplements and carries into effect the Congressional intent of FUSFSPA (10 U.S.C. § 1408(a)(2)) to 'abrogate all applications of the McCarty decision.' We hold that section 5124 authorizes the modification of the final judgment here to include a division of military retirement benefits. To this end the wife's pleadings may be amended to state a claim for relief under Civil Code section 5124." (Mueller v. Walker, supra, 167 Cal.App.3d at p. 609, fn. omitted.)

Given the California Supreme Court's Addison and Bouquet decisions, we agree with the Mueller court's disposition of the res judicata and due process concerns presented by section 5124. Husband contends that a distinction should be drawn between cases such as his--where the husband is already receiving payments--and cases where payments were not being made prior to February 1, 1983, the effective date of FUSFSPA, or at the time of the agreement, judgment or

decree. Husband, however, provides no authority or any reasons why such a distinction should be drawn.

C. Is section 5124 unconstitutional because it impairs the obligation of contracts?

Husband next contends that section 5124 unconstitutionally impairs contractual obligations. Here, husband and wife entered into a stipulation which was recited orally in open court and later reduced to writing in an interlocutory judgment of dissolution of marriage. Husband contends that this agreement between the parties is a valid contract and, as such, comes within the purview of the constitutional prohibitions against the impairment of contractual obligations.

The rules governing the constitutionality of legislation which impairs contractual obligations were recently stated

by the California Supreme Court in City of Torrance v. Workers' Comp. Appeals Bd. (1982) 32 Cal.3d 371.

> "The language of these clauses 'appears unambiguously absolute . . . .' (Allied Structural Steel Co. v. Spannaus (1978) 438 U.S. 234, 240 . . . .) 'No State shall . . . pass any . . . law impairing the obligation of contracts. . . .' (U.S. Const., art. I, § 10.) 'A . . . law impairing the obligation of contracts may not be passed.' (Cal. Const., art. I, § 9.) Read literally, these provisions appear to proscribe any impairment. However, it has long been settled that the proscription is 'not an absolute one and is not to be read with literal exactness like a mathematical formula.' (Home Bldg. & L. Assn. v. Blaisdell (1934) 290 U.S. 398, 428 . . . .)
>
> "As the United States Supreme Court recently stated, 'it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. . . ." [Citation.] As Mr. Justice Holmes

succinctly [stated] . . . "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter."' (Allied Structural Steel, supra, 438 U.S. at pp. 241-242 . . . .)

"Thus, a finding that the state in the exercise of its police power has abridged an existing contractual relationship does not in and of itself establish a violation of the contract clause. It is the beginning, not the end of analysis. A finding of impairment merely moves the inquiry to the next and more difficult question--whether that impairment exceeds constitutional bounds." (Id. at pp. 376-377.)

The factors to consider in determining whether the impairment of a contract exceeds constitutional bounds were stated in Donlan v. Weaver (1981) 118 Cal.App.3d 675, 682-683.

"The appropriate inquiry is whether the alteration of contractual rights and obligations effected [sic] by the statute, the impairment, is 'sufficiently necessary to the public welfare as to justify the impairment.' [Citations.]

"Probably the single most important factor to be considered in determining whether a particular impairment is

constitutionally permissible is the nature and extent of the impairment. 'The severity of the impairment measures the height of the hurdle the state legislation must clear.' [Citations.] Other important factors to be considered are the nature, importance and urgency of the interest to be served by the challenged legislation; and whether the legislation was appropriately tailored and limited to the situation necessitating its enactment. [Citations.]"

Having concluded that section 5124 does not violate the due process clause, by parity of reasoning we also hold that section 5124 does not violate the contract clause.

As stated in Donlan:

"[T]he criteria for determining whether the impairment of a vested property interest by legislation enacted under the police power violates substantive due process are essentially the same as those considered in determining whether state legislation impairing contract rights violates the constitutional prohibitions against impairment of contracts. (San Diego White Truck Co. v. Swift (1979) 96 Cal.App.3d 88, 93 . . . .)" (Donlan v. Weaver, supra, 118 Cal.App.3d 675, 684.)

The "paramount interest" of this state in the equitable distribution of marital

property upon dissolution of marriage, as affirmed by our Supreme Court in In re Marriage of Buol, supra, 39 Cal.3d 751, 760-761, clearly outweighs the interference with husband's rights under the contract. Section 5124 was appropriately tailored and limited to the situation necessitating its enactment. It was enacted so that the recovery of a community property interest in a military pension benefit would not be barred simply because the case by chance falls into the 18-month gap between the effective date of FUSFSPA and the McCarty decision. The act became effective January 1, 1984, and was repealed by its own terms on January 1, 1986. Thus, it appears clear that section 5124 is a proper exercise of the police power, and the statute does not unconstitutionally impair the obligation of contracts.

D. Is section 5124 preempted by federal law?

Husband contends that since the FUSFSPA contains a retroactivity provision and "Civil Code section 5124 attempts to override the limited retroactivity of the federal acts, . . . [t]he federal act pre-empts the State Legislature in this area." Not so.

It is true that FUSFSPA was made retroactive to the date of the McCarty decision; however, section 5124 does not attempt to override the limited retroactivity of the federal act or expand on it. While section 5124 refers to FUSFSPA, the clear intent and effect of section 5124 is to provide a procedure by which community property settlements, judgments, or decrees may be reopened even though the judgments, decrees or settlements have become final.

E. Is section 5124 an unconstitutional encroachment on judicial power?

Husband contends that section 5124, as it applies to judgments which are final, is an unconstitutional usurpation of judicial power by the Legislature in violation of the California Constitution, article III, section 3. Husband, however, provides no citation to case law or any discussion of the issue to support his contention. Our independent research has disclosed no cases which have discussed the same or similar issue. We reject husband's contention for these reasons.

Husband further contends that section 5124 is an interpretation of the retroactivity of a prior law (FUSFSPA) and, as such, is an exercise of judicial power in violation of the doctrine of separation of powers. An examination of section 5124

reveals that husband's contention is without merit. There appears nothing in this section which would indicate that it is an interpretation of the retroactivity of FUSFSPA.

The order appealed from is reversed and the cause is remanded for further proceeding consistent with this opinion. Wife to have her costs on appeal.

_____

J.

We concur:

_____

Acting P.J.

_____

J.

APPENDIX B

JULIENNE L. RYNDA, NO. 91271
Law Offices of
FARLEY, RYNDA & DE SANTOS
521 North Redington Street
P. O. Box 1118
Hanford, California 93232
Telephone (209) 584-2701

FILED
Jul 7, 1984
Joan L. Bullock
Kings County Clerk
Sandra Ronquillo, Deputy

Attorneys for Respondent

SUPERIOR COURT OF CALIFORNIA

COUNTY OF KINGS

In Re Marriage of	) No. 33277
	)
Petitioner: BETTY L. ABSHIRE fna BETTY POTTER,	) ORDER DENYING PETITIONER'S
and	) MOTION TO MODIFY INTERLOCUTORY
Respondent: JAMES A. POTTER	) JUDGMENT OF DISSOLUTION OF MARRIAGE RE MILITARY RETIREMENT BENEFITS

This proceedings came on for hearing on March 29, 1984, in Department One of the

above-entitled Court, the Honorable Larry G. McKee, Judge presiding. The Petitioner was present in Court with her attorney, Neil A. Helding. The Respondent was present in Court with his attorney, Julienne L. Rynda. This proceeding came on for hearing on the Order to Show Cause for Modification filed by the Petitioner on December 5, 1983. The Petitioner's Motion requested modification of the Interlocutory Judgment of Dissolution of Marriage entered on November 16, 1981, in this case which provided in paragraph 4 that the Respondent's military retirement benefits were set aside to him as his separate property.

Evidence was presented and written briefs of both counsel were filed.

The Court, having considered the file herein, the submitted evidence, briefs of counsel, and being duly advised, denies the

Motion to Modify the Interlocutory Judgment. To apply Civil Code Section 5124 as it is written would be unconstitutional in that to only modify an agreement with respect to the retirement benefit would be an ex post facto impairment of contract and on the further basis of the doctrines of res judicata.

IT IS SO ORDERED:

DATED: JUN 7, 1984 /s/ Larry G. McKee
LARRY G. McKEE
Judge of the Superior Court

APPROVED AS TO FORM:

DATED: June 6,1984 /s/ Neil A. Helding
NEIL L. HELDING
Attorney for Petitioner

MXEJ0103

APPENDIX C

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEALS
5TH DISTRICT, NO. F004298

Supreme Court
filed July 9th, 1986
Laurence P. Gill, Clerk

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

en banc

In Re Marriage of Potter

ABSHIRE
vs.
POTTER

Respondent's petition for review denied.

_____
Rose Bird,
Chief Justice

MXEJ0104

APPENDIX D

ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME AND ADDRESS) **TELEPHONE NO.**

LAW OFFICES OF NEIL A. HELDING (209) 584-6601
315 N. Douty Street
Box 1190
Hanford, California 93232

ATTORNEY FOR (NAME) Petitioner

SUPERIOR COURT OF CALIFORNIA, COUNTY OF KINGS

Government Center
1400 West Lacey Boulevard
Hanford, California 93230

MARRIAGE OF

PETITIONER: BETTY L. POTTER

RESPONDENT: JAMES A. POTTER

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE **CASE NUMBER** 33277

FOR COURT USE ONLY

Filed November 16, 1981
Joan L. Bullock
Kings County Clerk
/s/ Elsie Oliviera, Deputy

1. This proceeding came on for x default or uncontested _ contested hearing as follows:

   a. Date: 10-29-81 x Dept.: 1
      Div.: _ Room:

   b. Judge (name): Larry G. McKee
      _ Temporary judge

   c. x Petitioner present in court
      x Attorney present in court
      (name)
      Neil A. Helding

   d. x Respondent present in court
      x Attorney present in court
      (name): Julienne Rynda

   e. _ Claimant present in court
      _ Attorney present in court (name):

      ENTERED Vol. 81, Page 405
      11-16-81

2. The court acquired jurisdiction on the respondent on (date): 4-30-81

   a. x Respondent was served with process.

   b. _ Respondent appeared.

3. THE COURT ORDERS

a. An interlocutory judgment be entered and the parties are entitled to have their marriage dissolved.

b. After six months from the date the court acquired jurisdiction of the respondent a final judgment of dissolution may be entered upon proper application of either party or on the court's own motion, unless a dismissal signed by both parties is filed. The final judgment shall include such other and further relief as may be necessary to complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

c. Jurisdiction is reserved to make such other and further orders as may be necessary to carry out the provisions of this judgment.

4. x THE COURT FURTHER ORDERS upon stipulation of the parties in open court:

a. __ Wife's former name be restored (specify):

b. x Other: (See Attached)

5. Total number of pages attached: 6

xx Signature follows last attachment

THIS INTERLOCUTORY JUDGMENT DOES NOT CONSTITUTE A FINAL DISSOLUTION OF MARRIAGE AND THE PARTIES ARE STILL MARRIED. ONE OF THE PARTIES MUST SUBMIT A REQUEST FOR FINAL JUDGMENT ON THE FORM PRESCRIBED BY RULE 1288. NEITHER PARTY MAY REMARRY UNTIL A FINAL JUDGMENT OF DISSOLUTION IS ENTERED.

ALTHOUGH AN OBLIGATION BASED ON A CONTRACT IS ASSIGNED TO ONE PARTY AS PART OF THE DIVISION OF THE COMMUNITY, IF THE PARTY TO WHOM THE OBLIGATION WAS ASSIGNED DEFAULTS ON THE CONTRACT, THE CREDITOR MAY HAVE A CAUSE OF ACTION AGAINST THE OTHER PARTY.

NO ATTACHMENT PERMITTED ON LESS THAN A FULL PAGE. CAL. RULE OF CT 210(B)

FORM ADOPTED BY RULE 1287
JUDICIAL COUNCIL OF CALIFORNIA
REVISED EFFECTIVE JANUARY 1, 1981

INTERLOCUTORY JUDGMENT OF
DISSOLUTION OF MARRIAGE
(FAMILY LAW)

CC 4512, 4514 23

1. Custody of the three children of the marriage, JAMES A. POTTER, JR. (DOB 2-22-64); JOANNA POTTER (DOB 1-19-65); and JULIANNA POTTER (DOB 8-26-66) is awarded to Petitioner. Respondent shall have reasonable visitation off premises.

2. Respondent shall pay Petitioner on account of child support the sum of $100.00 per month per child ($300.00 total), payable on the first day of each month, commencing November 1, 1981 and continuing monthly thereafter until the child for whom the support is given dies, becomes 18, self-supporting or married, or until further court order, whichever event first occurs. Commencing March 1, 1982, the child support shall be $150.00 per month of JOANNA and $150.00 per month of JULIANNA ($300.00

total) subject to the same conditions aforestated.

3. Respondent shall pay Petitioner spousal support in the sum of $475.00 per month, commencing November 1, 1981 and continuing monthly thereafter until either party dies, Petitioner validly remarries, or until further court order, whichever event first occurs. The spousal support is allocated in the following manner: $300.00 cash and $175.00 as one-half of the reasonable rental value of the Lemoore home referenced herein.

4. The U.S. Navy Retirement benefits presently received by Respondent is confirmed to him as his separate property.

5. The property of the parties is hereby divided and awarded in an equal division as follows:

a. To Petitioner: All household goods not set over to Respondent herein; scrapbooks; photo albums; films, movies, and slides; slide and movie projectors; the painting of the children; 3 guns; 1979 Chevrolet Nova; 1949 Studebaker; the sum of $5,000.00 for her interest in the Colorado property (Lots 4, 5, and 6 in Block 8 in original Town of Springfield, Baca County, Colorado); one-half of the payments due and to become due, commencing November 1, 1981, from the Campbells relating to the sale of the pecan grove in Alabama; her Pen Air FCU

account; $1,507.40 from the joint Pen Air FCU account; $1,044.69 from the Navy Federal Credit Union account; the Wells-Fargo T-Bill and related savings account; the Heritage Savings and Loan account in Lamar, Colorado (except the sum of $250.00 thereof belonging to JAMES, JR.); the Franchise Tax Board 1980 tax refund; one head of livestock; a one-half interest in the Lemoore home as set forth herein; and her effects.

b. To Respondent: The tractor; tools and equipment; the .257 rifle from Uncle Vic; .357 Smith-Wesson revolver; .22 caliber revolver; squadron table; his personal effects; 1980 Ford Courier (subject to the bal-

ance due thereon which Respondent shall pay and hold harmless Petitioner therefrom); 1970 Cadillac; 1963 and 1964 Triumph Spitfires; $7,507.43 from the joint Pen Air FCU account; the proceeds of the NAS Alameda FCU account; the SPNB-IRA account; $1,044.69 from the Navy Federal Credit Union account; the First Navy Bank proceeds; the $4,200.00 proceeds from the Bank of America account; one head of livestock; one-half of the payments due or to become due, commencing November 1, 1981, from the Campbells relating to the sale of the pecan grove in Alabama; the Colorado property as described in (a) above; and a one-half interest in the Lemoore home as set forth herein.

c. Lemoore Home: This home, described as a 2.5 acre parcel located at 12457 16th Avenue, Lemoore, California and also described presently by the Assessor as APN 18-210-46 is hereby converted from a joint tenancy into an equal tenancy in common between the parties. Petitioner shall have the right to exclusively possess the premises, but Respondent may store his personal items on the premises. Petitioner shall pay the first trust deed payments to World Savings and the second trust deed payments to Giannoni. The balloon payment to Giannoni of about $1,622.41 due November 8, 1982 shall be paid equally by the parties. Petitioner shall also pay

for the property taxes, insurance, and routine maintenance on the property. Petitioner shall pay no rent to respondent. When the youngest child becomes 18 years of age, or if Petitioner vacates the premises prior thereto, then said property shall be sold as soon as possible and the net proceeds divided equally between the parties. If Petitioner validly remarried before the youngest child is 18, or if she vacates the premises before that time, then Respondent shall receive a credit of $175.00 per month based upon the number of months from the triggering event until the sale of the property, said sum to be paid from Petitioner's one-half of the net

proceeds. Respondent may purchase Petitioner's one-half interest when the property could be sold as herein provided upon paying Petitioner one-half of the net appraised value of the property (defined as the gross market value less encumbrances) as determined by an agreed appraiser.

d. The foregoing division also encompasses reimbursement to Respondent for payment of community debts after separation.

6. Respondent shall pay NEIL A. HELDING on account of fees and costs the sum of $415.00 with credit for $150.00 paid on account, at the rate of $25.00 per month, commencing November 5, 1981 and

continuing monthly until paid in full. A 20 day default in any one or more payments accelerates the unpaid balance. The balance of fees and costs for Petitioner and for respondent shall be borne by the respective parties. The reporter costs for this hearing shall be paid equally by the parties.

7. In the event modification or enforcement of this judgment becomes necessary, the parties agree that service of a Notice of Motion upon present counsel of record, or successor counsel of record upon notification, plus mailing a copy of said Notice of Motion to the other party at the last known address of that party shall be sufficient service upon the adverse party and shall allow the court to hear evidence and make valid, appro-

priate orders thereon. The Notice of Motion must give at least 30 days advance notice, measured from the date of mailing to counsel and the adverse party.

8. The court accepts the waiver in open court by each party of his and her rights to appeal or to ask for a new trial in this matter, so that a Final Judgment may sooner be entered herein upon application of one of the parties.

9. Petitioner shall pay the community obligation owing to Sears, Roebuck and Company and shall hold the respondent harmless therefrom.

10. With reference to Paragraph 5 c, the legal description of the Lemoore home

located at 12457 16th Avenue, Lemoore, California, is as follows:

> The South 243.0 feet of the West 448.26 feet of the Northwest Quarter of Section 7, Township 19 South, Range 21 East, Mount Diablo Base and Meridian, in the County of Kings, State of California, according to Government Township Plats approved April 5, 1855;
>
> EXCEPTING THEREFROM all oil, gas and minerals as previously reserved of record.
>
> Subject to a Deed of Trust of record in favor of Hanford Savings & Loan Association recorded in Book 873 at Page 21 of Official Records of Kings County, securing a Note in the original amount of $10,400.00, which has a principal remaining balance of $8,999.08, which the a grantee herein assumes and agrees to pay."

A copy of the Grant Deed for that property is attached hereto as Exhibit A and incorporated by this reference.

DATED: November 16, 1981.

/s/ Larry G. McKee
JUDGE OF THE SUPERIOR COURT

Approved as to Form and Content.

KAHN & SOARES

/s/ Julienne L. Rynda
JULIENNE L. RYNDA
Attorney for Respondent

MXEI2912

APPENDIX E

No. F-004298

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BETTY POTTER,
Petitioner,

v.

JAMES A. POTTER,
Respondent

No. F-004298

IN THE COURT OF APPEAL
5TH APPELLATE DISTRICT

BETTY POTTER,
Appellant,

v.

JAMES A. POTTER,
Appellee

NOTICE OF APPEAL

Notice is hereby given that James A. Potter, Respondent in the above-named cause, hereby appeals to the Supreme Court of the United States from the judgment and orders of the Court of Appeal for the 5th Appellate District, sitting in Kings County, California, in said Court's cause No. F-004298, in which judgment was entered on March 25, 1986, and from the denial of petition for review of said judgment by the Supreme Court of California on July 9, 1986, which order is the final judgment or decree rendered by the highest court of the state in which the decision could be had. This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Respectfully submitted,

Mattaniah Eytan,
Attorney for Appellant

PROOF OF SERVICE

I, Arlene Borick, declare that I served a copy of the above Notice of Appeal on Appellee by placing a true copy thereof, enclosed in a sealed envelope with first-class postage thereon, fully prepaid, in United States Mail, at San Francisco, California, addressed as follows:

Neil A. Helding, Esq.
623 West Grangeville Boulevard
Hanford, CA 93230

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 3, 1986, at San Francisco, California.

Arlene T. Borick
Arlene T. Borick

MXEJ0105

APPENDIX F:
Texts of Constitutional and Statutory Provisions.

United States Constitution

Impairment of Contracts. Art. I, § 10.

No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

Supremacy Clause. Art. VI, Cl. 2.

[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Due Process Clause. Fourteenth Amendment, § 1.

[N]or shall any State deprive any person of . . . property, without due process of law . . .

Statutes.

28 U.S.C. § 1408, 96 Stat. 718, 730-738, Pub. L. No. 97-252 (1982). Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means-

(A) any court of competent jurisdiction of any State, the District of

Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)));

(iii) division of property (including a division of community property); and

(C) in the case of division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to a spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which--

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes,

if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section --

(1) service of a court order is effective if --

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order --

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) (1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay

periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) (1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the

member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as a property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than one each month, and the Secretary concerned shall not be required to vary normal pay and

disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e) (1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more

former spouses or to more than one former spouse, the disposable retired or retainer pay of a member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3) (A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall --

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) Retain an amount of disposable retired or retainer pay that is equal to the lesser of --

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the

amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus --

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4) (A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding the other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C.659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1)

or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) (1) The United States and any officer or employee of the Untied States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of h is duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

California Civil Code § 5124. [Repealed January 1, 1986]. Division of Military Retirement Benefits.

(a) Community property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981, and as it has existed since February 1, 1983.

(b) Modification of community property settlements, judgments, or decrees under this section may be granted whether or not the property settlement, judgment, or decree expressly reserved the pension issue for further determination, omitted any reference to a military pension, or assumed in any manner, implicitly or otherwise, that a pension divisible as community property before June 25, 1981, and on or after February 1, 1983, was not, as of the date the property settlement, judgment, or decree became final, divisible community property.

(c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986.

(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed unless a later enacted statute which is chaptered before that date deletes or extends that date.

MXEJ0102

CERTIFICATE OF SERVICE

I, Mattaniah Eytan, one of the attorneys for appellant, James A. Potter, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of October, 1986, I served copies of the foregoing jurisdictional statement on the several parties thereto, as follows:

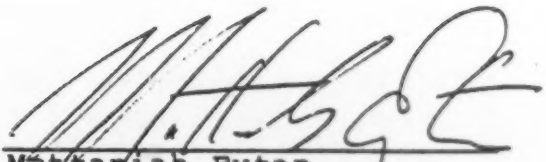
1. The Attorney General of the State of California by depositing a copy of the document in a United States mail box, with First Class Postage prepaid, addressed to Attorney General of the State of California, 350 McAllister Street, San Francisco, California 94102.

2. On Betty L. Abshire, by depositing a copy of the document in a United States mail box, with First Class Postage prepaid, addressed to her counsel of record, Neil A. Helding, Attorney at Law, Post Office Box 1190, Hanford, California 93232.

As a result of the foregoing, all parties required to be served have been served.

KAPLAN, RUSSIN, VECCHI,

EYTAN & COLLINS

By: 

Mattaniah Eytan
Attorney for Appellant
JAMES A. POTTER

MXEJ0212

SUPREME COURT OF THE UNITED STATES

ATTORNEY APPEARANCE FORM

No. _____

JAMES A. POTTER, APPELLANT

v.

BETTY L. ABSHIRE, APPELLEE

The Clerk will enter my appearance as counsel for James A. Potter, who in this Court is appellant.

I certify that I am a member of the Bar of the Supreme Court of the United States:

Mattaniah Eytan
KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS
580 California Street, 16th Floor
San Francisco, California 94104
Telephone: (415) 421-1100

Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-568

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JAMES A. POTTER,
Appellant,

VS.

BETTY L. ABSHIRE,
Appellee.

On Appeal from the Court of Appeal of California Fifth Appellate District

MOTION TO DISMISS APPEAL

NEIL A. HELDING
623 W. Grangeville Blvd.
Post Office Box 1190
Hanford, CA 93232
(209) 584-6601
Counsel for Appellee

January 23, 1987

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

14pp

QUESTION PRESENTED

Does California Civil Code Section 5124, which allowed for a period of two years, a modification of community property settlements, judgments, or decrees that became final on or after June 25, 1981 and before February 1, 1983 in a manner consistent with pre-*McCarty* and post-FUSFSPA law, contravene constitutional proscriptions.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Intervention by California Attorney General	1
Statement of the Case	2
The Court Should Dismiss the Appeal Because It Does Not Present a Substantial Federal Question and Because the Judgment Rests on an Adequate Non-Federal Basis	3
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases

Page

Federal Cases:

McCarty v. McCarty, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981) ..... *passim*

Merrill v. Town of Addison, 763 F.2d 80 (C.A.2d 1985) .. 1

State Cases:

Allison v. Allison, 690 S.W.2d 340 (Tex. Civ. App. 1985) 7

In re Marriage of Cox, 178 C.A.3d 240, 223 Cal. Rptr. 655 (1986) (107 S.Ct. 472-1986 re Cert.) 8

Faitz v. Ruegg, 114 C.A.3d 967, 171 Cal. Rptr. 149 (1981) 8

Heaton v. Marin County, etc., 63 C.A.3d 421, 133 Cal. Rptr. 809 (1976) 8

Statutes

Federal:

10 U.S.C. 1408 ..... *passim*

28 U.S.C. 2403(b) 1

State:

California Civil Code 5124 ..... *passim*

Miscellaneous

Vol. 3, U.S. Code Congressional Administrative News, 1982, P. 1599-1600 and P. 1611 4

California Rule of Court 977 8

No. 86-568

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JAMES A. POTTER,
Appellant,

VS.

BETTY L. ABSHIRE,
Appellee.

On Appeal from the Court of Appeal of California Fifth Appellate District

MOTION TO DISMISS APPEAL

INTERVENTION BY CALIFORNIA ATTORNEY GENERAL

Pursuant to 28 USC 2403(b), if the Court determines to consider and hear this Appeal, the California Attorney General should be permitted to intervene as provided in the quoted section, since the constitutionality of a state statute would be called into question. Such certification by the Court to the California Attorney General appears to be required (see *Merrill v. Town of Addison* (1985) 763 F.2d 80, 82-83 (C.A. 2d).

SUCCINCT STATEMENT OF THE CASE

1. Respondent Husband entered the U. S. Navy in July, 1953.

2. Petitioner Wife and Respondent Husband married on April 7, 1961.

3. Respondent Husband retired from the U. S. Navy on February 1, 1978, and began to receive retired pay monthly.

4. The parties separated on April 28, 1981.

5. Petitioner filed her Petition for Dissolution on April 28, 1981, alleging as community property the U. S. Navy Retirement.

6. Respondent filed his Response and Property Declaration to the Petition on May 13, 1981, alleging a community interest in the U. S. Navy Retirement commencing with the date of the 1961 marriage and a separate property interest in such retirement from July, 1953 to the 1961 marriage.

7. *McCarty v. McCarty,* 453 U.S. 210, 101 S.Ct. 2728, was decided on June 26, 1981.

8. Respondent filed an Amended Response and Community Property Declaration on September 21, 1981, now alleging that *all* U. S. Navy Retirement benefits were his separate property.

9. Interlocutory Judgment by Stipulation was heard on October 29, 1981 and entered on November 16, 1981. Paragraph 4 thereof confirmed the retirement benefits presently received by Respondent as his separate property. Paragraph 8 thereof contained a waiver of New Trial and Appeal by the parties.

10. The Final Judgment was entered on November 24, 1981.

11. Congress enacted the Uniformed Services Former Spouses' Protection Act on September 8, 1982, to take effect on February 1, 1983 (96 Stat. 730, Public Law 97-252).

12. The California Legislature enacted Civil Code Section 5124 in 1983 (Stats. 1983, Ch. 775), effective January 1, 1984.

13. Petitioner filed her Motion for a share of the military retirement of Respondent on December 5, 1983 with the hearing initially set for January, 1984.

14. The matter was heard by the Court on March 29, 1984 and the Court rendered its decision on May 31, 1984, declaring Civil Code Section 5124 unconstitutional, thus denying Petitioner a share of Respondent's military retirement. The formal order thereof was entered on June 7, 1984.

15. A Notice of Appeal was filed by Petitioner on June 28, 1984 to the Court of Appeal.

16. The California Court of Appeal, Fifth Appellate District, reversed the trial court decision on March 26, 1986, finding Civil Code Section 5124 to be valid.

17. The California Supreme Court denied Review on July 9, 1986.

THE COURT SHOULD DISMISS THE APPEAL BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND BECAUSE THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The Court's ruling in *McCarty v. McCarty* (1981) 453 U.S. 210, wherein the Court disallowed the division as community property the potential military retirement benefits of the military spouse who had served 18 years in the military service prior to separation from his spouse and the filing of a dissolution action, contained the following in the course of the majority opinion:

> "Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Secure Contexts; that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." (453 U.S. 236)

In evident response to the above quoted portion of the *McCarty* opinion, Congress enacted the Federal Uniformed Services Former Spouses' Protection Act (hereafter FUSFSPA) on Septem-

ber 8, 1982, to become effective February 1, 1983 (Public Law 97-252; 96 Stat. 730; 10 USC 1408).

FUSFSPA's "heart" is in 10 USC 1408(c)(1) set forth as follows:

> "(c)(1) Subject to the limitations of this section, a Court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

The *McCarty* case was decided June 26, 1981 so the "after June 25, 1981" reference in the statute manifests a clear intention, in my belief, to legislatively override the *McCarty* decision. Some expressions of "intention" are found in Volume 3, U.S. Code Congressional and Administrative News, 1982, as follows:

> *P. 1599-1600:* "The provisions of S. 1814 reversing the effect of the *McCarty* decision are retroactive to June 26, 1981, the date on which the U.S. Supreme Court issued that decision. That is, the committee intends the legislation to restore the law to what it was when the courts were permitted to apply state divorce laws to military retired pay. Former spouses divorced in the interim period between the *McCarty* decision and the effective date of this law will have the opportunity to return to court to have their decrees modified in light of this legislation."
>
> *P. 1611:* "Subsection (c) of section 1408 sets forth several conditions and limitations applicable to court orders served and payments made pursuant to section 1408. Paragraph (1) of subsection (c) provides that, subject to the other limitations of section 1408, a court, as defined by paragraph (1) of subsection 1408(a), may treat the disposable retired or retainer pay payable to a member for pay periods beginning on or after June 26, 1981, either as solely the property of the member or as the property of the member and the member's spouse, depending on the law applicable to the court in question. The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the

> date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit state and other courts of competent jurisdiction to apply pertinent state or other laws in determining whether military retired or retainer pay should be divisible. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision."

California Civil Code Section 5124 was the procedural device adopted by the Legislature to allow an implementation of the sharing of military retirement benefits by the non-service spouse under FUSFSPA where the "settlement, judgment or decree" fell after June 25, 1981 and before February 1, 1983, and to facilitate the retroactivity of FUSFSPA. It contains express language which leaves no doubt as to its intention to apply retroactively. It affects settlements, judgments, and decrees which became final after June 25, 1981 and before February 1, 1983. It was enacted in 1983, to be effective January 1, 1984. It had a "sunset" provision as of January 1, 1986.

California Civil Code Section 5124 reads as follows:

5124.

> (a) Community property settlements, judgments, or decrees that became final on or after June 25, 1981 and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981 and as it has existed since February 1, 1983.

(b) Modification of community property settlements, judgments or decrees under this section may be granted whether or not the property settlement, judgment or decree expressly reserved the pension issue for further determination, omitted any reference to a military pension, or assumed in any manner, implicitly or otherwise, that a pension divisible as community property before June 25, 1981 and on or after February 1, 1983, was not, as of the date the property settlement, judgment or decree became final, divisible community property.

(c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986.

(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed.

Civil Code Section 5124 would be brought into play via the modification process, which contains the concepts of notice, hearing, and Court discretion, thus assuring a "due process" review and redetermination.

Civil Code Section 5124 essentially encompasses two tiers of "retroactivity" as follows:

1. *Applicability to Settlements-Judgments:* Community property settlements, judgments, and decrees which became final between June 25, 1981 and February 1, 1983.

2. *Applicability to Retirement Benefits:* The division of military retirement benefits to the non-military spouse is only as to those benefits payable on or after February 1, 1983.

Thus, while settlements, judgments, and decrees which became final during the "hiatus period" of June 26, 1981 to February 1, 1983 could be set aside, the benefits to which the former non-military spouse could be entitled flow only from February 1, 1983, according to the express language of Section 5124. I believe that while Congress intended to allow the states to implement procedures to make the benefits "retroactive" as far as June 25, 1981, the California Legislature chose to allow a more limited retroactivity insofar as the receipt of benefits from the former military spouse is concerned, while at the same time allowing "settle-

ments, judgments, and decrees" within the "hiatus period" to be modified appropriately.

By way of contrast, in Texas where no "procedural mechanism" was enacted by the State Legislature, a Texas Court pointed out that FUSFSPA, by itself, does not mandate the reopening and modification of state divorce judgments (*Allison v. Allison* (1985) 690 S.W.2d 340 (Tex. Civ. App.). As the court expressed it:

> "Appellant cites this Court to some of the legislative history of the FUSFSPA stating the purpose of the Act was to allow parties to return to Court. As pointed out earlier in this opinion, the Federal Statute, which is permissive, cannot create the procedural mechanism to reopen final State Court judgments." (690 S.W.2d at 345.)

California Civil Code Section 5124 is not the "Chamber of Horrors" depicted by Appellant in his Jurisdictional Statement (see e.g. p. 28-35). As noted above, Civil Code Section 5124 had a "sunset provision" of January 1, 1986. The "window" has already closed on those affected.

The opinion in *McCarty* recited in clear terms the following:

> "This Court repeatedly has recognized that 'the whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States'." (453 U.S. at 221.)

Neither the District Court nor this Court should become "Divorce Courts," thus federalizing yet another area of the law and the lives of its constituency. The several states should continue to be allowed to have control over the status of marriage, custody of minor children, the support of the spouse, and the division of marital property.

The opinion of the California Court of Appeal, attached as Appendix A to the Jurisdictional Statement, and found in 179 C.A.3d 73; 224 Cal. Rptr. 312, eloquently deals appropriately with the issues raised by Appellant.

Some mention should be made of the *Cox* case (*In re Marriage of Cox* (1986) 178 C.A.3d 240; 223 Cal. Rptr. 665). In this California Court of Appeal case, the former wife was denied a share of her former husband's retired pay, on the basis that *McCarty* applied to divorces finalized during the "hiatus period" of June 26, 1981 and February 1, 1983 and that, therefore, Civil Code Section 5124 must "yield" to what the *Cox* court (on a 2-1 decision with a vigorous dissent) believed was the supremacy of *McCarty*.

I am informed that the *Cox* case was "decertified" by the California Supreme Court. As such, under California Rule of Court 977, decertified opinions of the Court of Appeal are not to be cited nor do they have precedential value (see *Faitz v. Reugg* (1981) 114 C.A.3d 967 and *Heaton v. Marin County, etc.* (1976) 63 C.A.3d 421. I understand that *Cox* was before this Court on a Petition for a Writ of Certiorari which was denied by the Court on November 17, 1986 (Case No. 86-283). Justice White, with a concurrence of Justice O'Connor, wrote a dissent which appears in 107 S. Ct. 472.

In short, *Cox* is an aberration that has essentially been removed from recitation as "authority" or "conflict."

CONCLUSION

The only real issue is whether Civil Code Section 5124, together with FUSFSPA, can properly be applied to persons such as Betty L. Potter-Abshire upon the facts of her case. To reject her request to allow her to share in her former husband's vested and matured military retirement (vested and matured *three years before separation*) will create one set of laws and rules for pre-*McCarty* and post-FUSFSPA spouses, and another and opposite set of rules for spouses of retired military veterans like Mrs. Potter-Abshire, simply on the fortituous basis of when their divorce was "final:" that is; between June 25, 1981 and February 1, 1983. Such an anomalous result not only offends equitable principles long embedded in dissolution cases, but exalts the mere timing of an action over the real substance of the action. Both Congress and the California Legislature have properly combined to deal with this issue by the enactment of FUSFSPA and Civil

Code Section 5124. A "window" was fashioned through which former spouses like Mrs. Potter-Abshire may not only view but enjoy the fruits of a military retirement like those who finally divorced before June 26, 1981 or after February 1, 1983. While military personnel may feel that their retirement is "theirs" alone, such is an essentially selfish view since it is common knowledge that during military service, there are separations, frequently moving, relocation of children in school, making new (albeit often temporary) friends, contending with damaged or lost household goods in transit, and "one-parenting" by the wife while her husband is away on lengthy cruises, maneuvers, or other military assignments. Each spouse "pays a price" as a husband serves his country and provides income from his employment therewith for his family. Each spouse looks forward in anticipation of retirement from active military service, and the sharing of the "fruits" from actual retirement.

In this case, Mr. Potter retired and both spouses enjoyed the "fruits of the monthly retirement" until the advent of *McCarty,* which swept away the rights of non-military spouses to a share thereof upon divorce. The result was a "windfall" to Mr. Potter and an inequity to Mrs. Potter-Abshire, a result which Congress and the California Legislature enacted laws quoted herein to correct.

DATED: January 23, 1987.

Respectfully Submitted,

NEIL A. HELDING
Counsel for Appellee